Brewery Products, Inc. *and* Local 247, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO. Case 7–CA–28442

March 19, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On July 19, 1989, Administrative Law Judge Wallace H. Nations issued the attached decision. The Union filed exceptions and a supporting brief, and the Respondent filed a brief in opposition to the Union's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Brewery Products, Inc., Ann Arbor, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(c) and reletter the subsequent paragraphs.

''(c) Mail a copy of the attached notice marked ''Appendix'' to the Union and to all unit employees who were employed at the Ann Arbor, Michigan facility. Copies of the notice, on forms provided by the Respondent's authorized representative, shall be mailed by the Respondent immediately upon receipt.''

CHAIRMAN STEPHENS, dissenting in part.

In my view the record supports a finding that the Respondent sought to protect its single nonunion unit employee, William Dunckel, from the effects of its lockout in two respects. I would find (1) that the Respondent induced employee Denny McCray, whom it was hiring as a temporary replacement in the lockout, to get Dunckel hired as McCray's replacement with McCray's former employer, and (2) that—at least until the unfair labor practice charges were filed in this case—the Respondent, without legitimate nondiscriminatory reasons, continued Dunckel's health insurance coverage while ceasing to pay for that of the other unit employees. I would therefore find that the Respondent violated Section 8(a)(3) and (1) of the Act by instituting a discriminatory lockout and discriminating in the provision of health insurance. I, accordingly, would also order the appropriate remedy for such violations—that the unit employees be reinstated with backpay and otherwise be made whole for the discrimination against them.

Richard F. Czubaj, Esq., for the General Counsel.
Mark S. Demorest, Esq., of Bloomfield Hills, Michigan, for the Respondent.
Ellen F. Moss, Esq., of Southfield, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. On September 9, 1988,[1] Local 247, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO (the Union) filed an unfair labor practice charge against Brewery Products, Inc. (Brewery Products or Respondent). An amended charge was filed by the Union on October 4, 1988. On October 31, the Regional Director for Region 7 issued a complaint against Respondent alleging that it has violated the National Labor Relations Act (the Act) by failing to provide copies of certain payroll information to the Union; by discriminatorily providing health insurance to a locked-out nonunion employee; and by failing to pay accrued vacation benefits to locked-out employees.

On March 3, 1989, an amended complaint was filed against Respondent alleging, in addition to the allegations contained in the original complaint, that Brewery Products failed and refused to bargain in good faith with the Union

[1] The Union has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Drywall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

No exceptions were filed to the judge's findings that the Respondent violated Sec. 8(a)(5) and (1) both by delaying provision of the requested warehouse-employee-payroll information to the Union during 1988 collective-bargaining negotiations, and by refusing to provide the Union with a copy of the Sales Agreement the Union requested on March 15, 1989. Similarly, no exceptions were taken to the judge's findings that the Respondent hired employee McCray as a temporary replacement, and that the Respondent did not unlawfully delay negotiations after the June 20, 1988 lockout or unlawfully fail to compensate locked-out employees for vacation pay.

[2] The Union excepts to the judge's finding that the Respondent's misrepresentation about warehouse employee Dunckel's hours of work was ''almost irrelevant to negotiations,'' and ''would seem to be more important in a grievance proceeding to determine whether he was a full or part-time employee and whether he was being properly compensated under the terms of a contract.'' We agree with the Union that the requested information on Dunckel's hours of work was relevant for negotiating purposes, including for the Union to assess the value of the Respondent's total contract proposal. We also find, however, that the parties' bargaining positions were so polarized at the time of lockout that the Respondent's failure timely to provide this information did not preclude meaningful bargaining.

[3] The Union excepts to the judge's proposed order requiring the Respondent to post the notice to employees at its Ann Arbor place of business. The Union asserts that the Respondent has ceased its operations and a district court has so found. See *Schaub v. Brewery Products*, 133 LRRM 2342, 2343 (E.D. Mich. 1989). (''In the instant case, the assets of respondent have apparently been sold and respondent has ceased all business operations.'') Because the Respondent has ceased its operations, we shall require it to mail copies of the notice to all unit employees employed at the time of the closure. See, e.g., *Print-Quic*, 262 NLRB 857, 862 fn. 19 (1982).

[1] All dates are in 1988 unless otherwise noted.

and that the lockout was in violation of the Act. Hearing was held in these matters in Detroit, Michigan, on April 26 and 27, 1989. At the hearing, counsel for the General Counsel sought to further amend the amended complaint by adding to paragraph 14(c) the language set out and italicized below:

> On or about June 9, 1988, [Respondent] prematurely declared that the parties were at an impasse after failing to afford the Charging Party with a reasonable opportunity to review the previously requested information provided that day *and after failing to provide the information requested with regard to the proposed pension plan.*

The proposed amendment was rejected at the hearing based on Respondent's legitimate claim of surprise. Briefs were received from all parties on or about June 16, 1989. The General Counsel has requested review of the decision to reject the amendment on brief and after careful review of the record, I have decided to reverse my earlier ruling and allow the amendment. I agree with the General Counsel that the record was fully developed on this point and Respondent will not be unfairly prejudiced by the amendment.

The General Counsel was also allowed at hearing to amend the complaint to add an allegation that Respondent violated the Act by refusing on and after March 15, 1989, to furnish a copy of a proposed agreement providing for the sale of certain assets of Respondent to another company.

Based on the entire record, and on my observation of the demeanor of the witnesses and in consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent Brewery Products, Inc. is a Michigan corporation located in Ann Arbor, Michigan, and engaged in the wholesale sale and distribution of beer and other beverages to retail establishments. Respondent has admitted the jurisdictional allegations of the amended complaint and I find that it is now and has been at all times material to this proceeding, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION INVOLVED

It is admitted and I find that the Union is now and has been at all times material to this proceeding, a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. *Introduction and Issues Presented*

During the course of protracted negotiations between the Union and Respondent for a new collective-bargaining agreement, Respondent locked out its unit employees. It is contended by the Charging Party and the General Counsel that the lockout was unlawful as impasse in negotiations was prematurely declared by Respondent because it had, inter alia, failed to provide the Union with relevant information in a timely fashion. It is further contended that after the lockout, Respondent continued to employ a nonunion employee to perform bargaining unit work and continued his health benefits while refusing to pay the union employees' health benefits payments and denying union employees accrued vacation. At some point in the winter or early spring of 1989, Respondent decided to sell the Company and/or its assets and refused to comply with a union information request concerning this possible sale. The amended complaint presents the following issues for determination:

1. Did Respondent unlawfully fail to provide the Union with requested warehouse employee payroll information in a timely manner?
2. Was the warehouse payroll information that was furnished adequate or was it a misrepresentation of the facts?
3. Did Respondent fail to provide the Union with information pertaining to proposed changes in the pension plan and its effects on unit employees?
4. Did Respondent act in bad faith and in violation of the Act when it locked out its employees?
5. Did Respondent unlawfully refuse to pay its locked out employees their accrued vacation pay?
6. Did Respondent unlawfully continue to provide health insurance coverage to non-union locked out employee while refusing to continue coverage to locked out Union employees?
7. Did Respondent unlawfully refuse to provide the Union with a copy of a proposed sales contract?

B. *Facts Giving Rise to the Dispute*

Respondent is a Michigan corporation located in Ann Arbor and is engaged in the wholesale sale and distribution of beer and other beverages to retail establishments. It is owned by Walter and Paul Godek. Since approximately 1967, the Union has represented a unit of Respondent's employees, including driver/salesmen and warehouse employees. During the time of the events in question, the unit consisted of three driver/salesmen and one or two warehouse employees. In addition, Respondent hired a few part-time employees each summer. The contract provided for such seasonal employees and allowed them to work outside the proscriptions of the union-security clause. The most recent contract between the parties was negotiated between the Union and the Bi-County Wholesale Distributors Association (the Association), of which Respondent was a member. In early 1987, prior to the contract's April 30, 1987 expiration date, Respondent sent to the Union a timely notification of its resignation from the Association and a request to open bargaining for a successor agreement. After that time, the parties engaged in 26 or 27 bargaining sessions, without success.

Major issues which were in contention were, inter alia, wages, unit composition, subcontracting, health insurance, and pension benefits. Throughout the bargaining period, Respondent demanded a significant reduction in wages, from 46 cents commission per case of beer delivered under the last year of the expired contract, to 25 cents per case under the second year of the proposed agreement. Respondent also sought to change health and pension plans from existing Teamsters' plans to plans of Respondent's choosing. Respondent also proposed removing both warehouse and part-time employees from the bargaining unit.

Respondent sought the concessions because it believed that if concessions were not obtained, it would no longer remain

a viable company. Its business had declined in size over the years, from eight routes 10 years before to three routes at the time of the lockout. This decline was due to the decline in popularity of Pabst beer, Brewery Products' chief domestic brand. An additional reason Respondent sought economic concessions was that Brewery Products had converted from a ''driver sale'' to a ''presale'' system, but that change in Respondent's operation was not reflected in the way its drivers were compensated. The conversion had taken place well before the expiration of the last contract between the parties. Respondent contends that the presale method of operation saves drivers 1-1/2 to 2 hours a day in paper work. Therefore, under the presale system, a driver is compensated less per case, but is presumably able to deliver more cages in the time he works daily. Brewery Products had withdrawn from the Association because the other members were much larger than it and Respondent believed it was necessary to bargain separately so a new contract would address the issues which were unique to it.

The Union opposed the Respondent's proposed concessions, though it knew of the Respondent's difficulties. The Respondent contends and the evidence supports the contention that the Union's strategy in negotiations was to prolong them as long as possible in order to delay granting any concessions to Brewery Product. The Company filed an unfair labor practice charge against the Union in 1987 to get the Union to the bargaining table. The Union settled the charge by, in the words of its negotiator, ''starting to negotiate.'' The Respondent also contends and is supported by the evidence that the Union was unwilling to grant major concessions to Brewery Products while negotiation were also underway with the Association. Union Vice President Dave Schuler testified he was not going to let the ''tail wag the dog,'' referring to the relationship of Brewery Product to the Association members. Schuler testified that he was not going to take what the Respondent had proposed and have that ''come forth as a settlement that would affect the outcome of the other three, or would be used against me by the other three.'' He further testified that he had not gone into bargaining with the idea of concessions though it was not something beyond comprehension. The negotiations with the Association were not resolved until January 1989, long after the June 20, 1988 lockout began.

C. *The Payroll and Pension Plan Information Request Issues*

On November 12, 1987, the Union requested payroll information on the warehouse and part-time employees.[2] The Union renewed its request several times, including five consecutive sessions in April through June 1988. On May 4 and June 2, Respondent told the Union that Respondent was not certain that it was obligated to provide that information. Brewery Products took the position that the sole warehouse employee, William Dunckel, was not part of the bargaining unit as he was a part-time employee and for that reason, a response to the request was unnecessary. Part of the basis for Respondent's position in this regard was the Union's failure to process a grievance it had filed to ascertain Dunckel's status with respect to the bargaining unit.

On May 10, Respondent told the Union that it was putting the information together; but, on June 2, said the information was not available. Also on June 2, the Respondent withdrew its proposal to exclude warehouse employees from the unit. At a meeting held on June 9, 1988, Respondent withdrew its proposal to remove part-time employees from the unit, but still proposed that they not receive fringe benefits. On June 9, Respondent provided the requested information. Copies of the payroll records of warehouse employee Dunckel and a seasonal employee were shown to the Union. Though copies of these records were not given to the Union on June 9, they were mailed to the Union and received by it a few days after the meeting.

Respondent also produced on June 9 worksheets breaking down the hours worked by Dunckel for Respondent and Auto Plaza Leasing, another company owned by the owners of Brewery Products. Although the Union's vice president Schuler testified that he did not recall receiving the worksheets, Brewery Products' president Walter Godek, testified credibly that copies of these worksheets were made at the motel where the June 9 meeting was held and given to Schuler. However, the records provided did not adequately explain the division of hours worked at Respondent and at the auto leasing company by the one current warehouse employee.

I agree with the General Counsel that Respondent's document showing the division of hours apparently misrepresented the number of hours worked for Respondent by Dunckel. During negotiations, Respondent told the Union that Dunckel worked part time for Respondent and part time for Auto Plaza Leasing. While Dunckel worked 40–45 hours per week, Respondent told the Union that he only worked 25 hours a week for Respondent and the remainder for Auto Plaza Leasing. Dunckel, however, credibly testified that he only worked 1 or 2 hours per week for Auto Plaza Leasing. The document presented by Respondent to support its position appears to me to be nothing more that an arbitrary assignment of Dunckel's hours to one company or the other, with no real relationship to the type work actually performed. On the other hand, there is nothing in the evidence to lead me to believe that there exists any other document relating to Dunckel other than those given. The documentation furnished assigning hours between companies was evidently relied on by Respondent to assign Dunckel's pay for tax and accounting purposes. I can only speculate on Respondent's motive for maintaining these records which do not seem to comport with the facts. It could be for tax or accounting reasons, or it could be, as the General Counsel asserts, to bolster Respondent's earlier position that the warehouseman position was not in the bargaining unit as it was part time. However, the documentation presented reflects the Respondent regularly assigned 25 hours per week of Dunckel's time to its payroll. Therefore, even based on this documentation,

[2] Respondent contends that part-time employees had never been included in the bargaining unit. The only description of the unit is by a contract reference to a job classification schedule which does not mention regular part time with respect to the job classifications listed. The schedule also references minimum hours for the jobs which are high enough to infer that all the unit positions are full time. Although Union Vice President Schuler disagreed, he could point to no contract language to support his position. He testified that he had been informed by Respondent that at an earlier time, one of Schuler's predecessors had agreed that persons employed to work with bottle returns would not be part of the bargaining unit if they worked less than 20 hours per week. It appears to me that this agreement would be the best definition of the breaking point between part-time and full-time work, as the contract itself does not contain a clear definition.

Dunckel would not have been a part-time employee if one used the 20-hour-per-week standard contained in Respondent's agreement with the Union defining what constitutes part-time work with respect to bottle return workers.

As by June 9, Respondent had withdrawn its proposals to remove warehouse employees and part-time employees from the unit, Dunckel would have been included in the bargaining unit regardless of whether he was a full-time or part-time employee of Respondent. As noted above, I believe he would have been a full-time employee based on the past agreement and Respondent's documentation. In a letter sent by Schuler to Godek on June 14, Schuler thanked Godek for the information on the warehouse employees. The letter did not ask for any further information on the warehouse employees. Although the Union and the General Counsel contend that the information supplied with respect to the division of Dunckel's hours between Respondent and Auto Plaza Leasing was either incomplete, misleading, or both, I find that it was the information used by Respondent and that its representation that Dunckel worked less hours for Respondent than he actually worked did not preclude meaningful bargaining by the Union.

The Respondent's last proposal before the lockout contained proposed hourly wage rates which would apply to the position of warehouseman. The Union had been furnished the wage rate previously paid for the position. It appears to me that the Union was in a position to intelligently evaluate the proposal based on what it had been provided and to decide whether it was acceptable or not. In fact, Vice President Schuler's letter of June 14 contains a counteroffer with respect to the proposed hourly wage rates for warehousemen. The misrepresentation about Dunckel's hours would seem to me to be more important in a grievance proceeding to determine whether he was a full or part-time employee and whether he was being properly compensated under the terms of a contract providing wage rates and benefits for both levels of employment. It appears obvious to me that, depending on the future volume of the Respondent's business, it might have need for a part-time warehouseman or a full-time warehouseman or some combination of each. The contract being negotiated would have to address the fact that the position could be either full or part time. Thus, Dunckel's previous status in this regard appears to me to be almost irrelevant to negotiations when Respondent agreed to include both full and part-time warehousemen positions in the bargaining unit.

I do find the delay in providing the information to be undue as the information was clearly necessary and relevant to bargaining over the wages and benefits for the involved employee or employees, and at least until June 9, to bargaining over the identity of the unit. As the delay was undue I find it in violation of the Act. However, I do not find that it constitutes anything more than an isolated instance of bad faith, and is not indicative of a course of bad-faith bargaining by Respondent. I also cannot find that the delay in providing this information played a significant role in the lack of progress of negotiations. The almost absolute lack of movement on wage rates for the drivers, as well as the parties' intransigent positions on Respondent's health insurance and pension proposals seem the key factors in delaying the negotiations. I believe delay was also caused by the Union's reluctance to reach agreement with Respondent before it had reached agreement with the Association.

I do not believe that Respondent's actions with respect to information requests concerning its pension and health insurance proposals were either unlawful or would indicate bad-faith bargaining. Respondent provided to the Union during negotiations certain documentation regarding the pension proposal. There apparently remained a question of what the effect of the plan would be on the older affected employees. Union Vice President Schuler testified that the Godeks gave him the name of their pension consultant and asked Schuler to call him with any questions he might have as the Godeks were not experts on pensions. Shortly after giving this testimony, he changed his mind and said that he had not been given such a contact by the Godeks. He was then shown a letter with the name and address of the consultant shown thereon and admitted having received it. The Godeks testified that they did in fact give Schuler the name of the consultant and asked that his questions be addressed to him because of their lack of knowledge with respect to pensions. I credit the testimony of the Godeks and the first testimony of Schuler. Respondent also told its consultant that it had given the consultant's name to Schuler and that he might call. The consultant offered to meet with Schuler or make a presentation to the employees. Schuler did not call the consultant.

The General Counsel contends that this does not constitute an adequate response to the information request as he construes the direction to call the consultant as shifting the Respondent's burden to supply information to the Union. I cannot agree. Clearly, no one with Respondent was fully competent to answer all questions about its proposed pension plan. To make available its consultant for questions by the Union appears to me to be the most efficient and effective way to provide the Union with correct information. To have the Union ask a question of one of Respondent's owners and rely on them to accurately pass the request on to their consultant and then try to accurately relay the answer seems to me to stress form over substance to an inordinate degree. The cases[3] cited by the General Counsel in support of his position involve situations where the involved union was held not to have to conduct some form of independent research or investigation to find information which was relevant and necessary and which was in the control of the involved respondents. In the instant case, Respondent offered to make available any information desired, asking only that such requests be directed to its agent, the pension consultant. I can see little, if any difference in Respondent directing the Union to its consultant and what might be the case in a much larger company of directing the Union to a benefits department. I find Respondent's actions with respect to the pension plan information request to be lawful and do not constitute an unfair labor practice.

As noted above, Schuler did not call the consultant. However, in January 1989, he did write the Union's Central States Pension Fund requesting pension information about the effect of unit members' pulling out of the fund. This information was available only from the fund and could not have been provided by Respondent. I firmly believe that Respondent's request of the Union to direct its pension questions to its consultant was reasonable and certainly does not constitute a refusal to supply necessary and relevant informa-

[3] *New York Times Co.*, 265 NLRB 353 (1982); *Kroger Co.*, 226 NLRB 512 (1976); *American Beef Packers*, 193 NLRB 1117 (1971).

tion. I also believe that Vice President Schuler's disinterest in calling the Respondent's consultant and his approximate 6-month delay in contacting his own pension experts for necessary information that only they could provide, seriously undermines the stated level of importance of the pension information to the negotiations at the time of the lockout.

The General Counsel does not contend on brief that the Respondent failed to provide adequate information with respect to Respondent's health insurance proposal and indeed, Vice President Schuler indicated in his testimony that the information supplied by Respondent prior to the lockout was adequate to evaluate the proposal.

D. *The Lockout Issues*

The Board has held that, absent proof of antiunion motivation, it is not a violation of Section 8(a)(3) of the Act for an employer to lock out its bargaining unit employees, and continue to operate with temporary employees during the lockout, to bring economic pressure to bear in support of a legitimate bargaining position. *Harter Equipment*, 280 NLRB 597 (1986); *Georgia-Pacific Corp*., 281 NLRB 1 (1986).

It is Respondent's position that the the lockout was instituted to put pressure on the Union to speed the pace of negotiations and was only expected to last a few weeks, based on previous experience with strikes. At the time of the lockout, the parties had been negotiating for a year and had met in approximately 27 negotiation sessions. The parties were still far apart on many significant issues including: (1) commission rates for cases of beer delivered, (2) Respondent's health insurance and pension plan proposals, and (3) noneconomic proposals such as subcontracting. The minor change in the commission rates offered by the Union on June 14, 1988, did not break the deadlock.[4] As noted by Respondent, the offer did not address any of the other key issues and Vice President Schuler admitted that he knew the offer would be unacceptable when it was made. I find that the parties were at impasse on the date of the lockout. The delay in providing payroll information and the date of its provision in relation to the date of the lockout do not appear to me to be of sufficient importance to negate a finding of impasse. Indeed, in the months following the lockout, no significant movement has taken place on any of the key economic issues which existed at the date of the lockouts' inception, though bargaining has continued.

Although I have found that the delay in providing requested wage information constitutes an unfair labor practice, I also find that neither this delay nor Respondent's actions in response to the Union's health insurance and pension plan information requests rise to the level of bad-faith bargaining and do not cause the Respondent's June 20, lockout to be unlawful ab initio. In the context of the lockout, Respondent's delay in providing the wage information was cured by either the provision of the information before the lockout or the withdrawal of the unit definition proposals before the lockout or both. I also find significant that there is no proof in the record of antiunion motivation on the part of the Respondent and the fact that Respondent did not implement its last offer, indicating to me a willingness to continue to bargain in good faith.

1. Issue of delay in bargaining

Shortly after the lockout began, Brewery Products canceled one negotiating session, scheduled for July 7, due to an emergency on the part of the Company's attorney. Vice President Schuler testified that Respondent also canceled a meeting which had been scheduled for June 28, 1988; but Respondent's president testified that the meeting was not canceled by the Company. The documentary evidence regarding this cancellation does not specify who canceled the meeting. The parties did meet in negotiations on August 2 and September 15.

After September 15, the Union, calling the lockout illegal, refused to negotiate with Respondent. Respondent filed an unfair labor practice charge to force resumption of negotiations. As of the date of hearing, there had been no change in either of the parties' positions on the major outstanding issues. I cannot find that Respondent's behavior as set forth above reflects a reluctance of the part of Respondent to bargain or is evidence of bad-faith bargaining.

2. Issue of employment discrimination

On Monday, June 13, or Wednesday, June 15, Respondent made its decision to lock out its employees. Respondent did not desire to lock out warehouse employee Dunckel, who was not a member of the Union. However, on advice of counsel, it decided to lock out Dunckel also. Dunckel testified that on June 17, Walter Godek told him that because of labor problems Dunckel could not work for Respondent for awhile, but might be able to work for S & A Beverage, whose owner, Al Baker, was parking his truck at Respondent's facility. Dunckel testified that Godek told him to speak to Denny McCray, S & A Beverages' sole driver, whom Godek had just hired.[5] According to Dunckel, he spoke to McCray on June 18 and Baker on June 20, and was hired on that date by S & A.

McCray testified that because he felt badly about giving 3 days' notice to his employer, Baker, he suggested Dunckel to Baker as a possible replacement for him. He knew that Dunckel was going to be available for work because of the lockout. Baker and Dunckel both testified that they met on June 20, Dunckel was offered work with S & A and Dunckel accepted. The General Counsel contends that Respondent orchestrated the switch between Dunckel and McCray and thus discriminated against its three locked-out drivers who were not similarly found employment. I disagree primarily because I found Baker to be an entirely credible witness and credit

[4] The Union proposed that commission rates for cases of beer delivered remain the same as in the old contract for the first year of the new contract and then increase in the second and third years. It also counterproposed to Respondent's $7.35 to $8 per hour wage rate applicable to warehousemen, an hourly rate of $11 rising to $11.80 in the third year of the proposed agreement.

[5] The Union asserts that McCray was hired as a permanent, not a temporary employee, based on certain of McCray's testimony. On brief, it argues that McCray was given a uniform and a yearly salary, indicia of the permanent nature of his employment. Godek testified that McCray was hired as a temporary. In response to the question of whether Godek told him the job was temporary, McCray testified, ''I—they were pretty vague. I was hoping it would be permanent, but it wasn't actually said it would be permanent.'' He testified that though it was his understanding that the job would be permanent, Godek never told him that. The job given to McCray did not have a yearly salary. He was paid in a similar fashion as the unit drivers, on a per case of beer delivered basis. I do not believe that McCray's testimony contradicts Godek's assertions that McCray was a temporary employee as he admitted he was never told the job would be permanent.

his testimony that he did not speak to either of the Godeks about Dunckel until after he had hired him. He also testified credibly that he would have hired virtually anyone to drive for him on June 20 because of the bind that McCray's leaving had caused his business. Without consultation between the Godeks and Baker, there could be no orchestration of the employee switch. There was no showing that any ties existed between Respondent and S & A Beverage and certainly no ties which would have caused Baker willingly to give up his experienced and longtime employee, McCray, for a new employee unfamiliar with his business.

3. Issue of insurance benefits

The General Counsel also contends with respect to Dunckel that Respondent's continuation of his health insurance benefits after the lockout constitutes discrimination as these benefits were not continued for the three locked-out union drivers. Respondent paid Dunckel's health insurance premium due June 20, which covered the period from July 1 through September 30. Since October, Dunckel has paid for his own health insurance. It is Respondent's position that it, at least initially, thought it was required to continue Dunckel's insurance payments because of the provisions of the Comprehensive Omnibus Budget Reconciliation Act (COBRA), which provides for continued health coverage to employees who have lost employment for reasons other than cause. However, these provisions do not apply to employers like Respondent which employ less than 20 employees. Respondent also contends that it paid the 3-month premium for Dunckel to be equitable as it believed, based on a union booklet explaining its Health and Welfare Fund, that the three union drivers' health insurance would be continued for 8 weeks based on contributions made earlier by Respondent.

Union Vice President Schuler testified that though there were provisions in the health and welfare plan that would have continued coverage for employees for an 8-week period after separation from employment, there was sufficient ambiguity in the provisions to bring into question whether the involved drivers were eligible for the extended coverage since a labor dispute was involved. In the circumstances, the local union decided to make arrangements for continued coverage for the drivers.

I find that the Respondent's reasons for paying the premium for one quarter for Dunckel and its understanding of the relevant provisions of the Union's health and welfare plan are plausible and do not appear to be contrived, though perhaps incorrect. I also believe that the treatment given the involved employees was roughly comparable. I cannot, therefore, find that Respondent discriminated against its three locked-out union drivers in favor of its one nonunion member warehouseman.

4. Issue of vacation pay

The General Counsel contends that Respondent committed an unfair labor practice by failing to pay vacation pay to the locked-out drivers during the lockout. Respondent contends that these employees were not entitled to receive vacation pay during the lockout under the terms of the expired contract.

One of the drivers was normally paid his vacation pay when he took his vacation. Since this driver did not take a vacation in 1988, Respondent asserts that he was not entitled to be paid vacation during the lockout. The other two, more senior drivers, were normally paid their vacation pay on their anniversary dates in September. However, the expired collective-bargaining agreement provides that, ''Vacation pay in lieu of time off for vacation must be mutually agreed by both Employer and employee and the Union.'' Respondent contends that it never agreed that the drivers could receive their 1988 vacation pay without taking a vacation, and under its interpretation of the expired agreement, the drivers were not entitled to such pay during the lockout.

Respondent paid the vacation pay in November 1988 because, according to Respondent, it desired to avoid litigating the issue and wanted to help break the impasse. I credit Respondent's reasons for its actions in this regard and do not find it committed an unfair labor practice as alleged. Although I find Respondent's reliance on the expired agreement somewhat tenuous, it is not a frivolous reason for its stance. In the absence of a showing of clear animus and as it did pay the benefits within a relatively short time after they were due, I find that Respondent's delay in paying the benefits does not rise to the level of unlawfulness.

E. *Sales Agreement Information Request Issue*

On about March 15, 1989, the Union requested a copy of a sales agreement which had been entered into between Brewery Products and another company, providing for the sale of certain assets of Brewery Products to that company. At that point, Respondent declined the request because the sale was still contingent on several things and the sale might not be consummated.

Since the trial in this matter, the Union has come into possession of a copy of the agreement. Respondent had previously provided a copy of the agreement to the Board for its use only, but a copy of the agreement was attached by the Board to its petition for temporary restraining order and preliminary injunction under Section 10(j) of the Act. The Union received a copy of the agreement when it received a copy of the petition.

However, even though the Union has come into a possession of the agreement, I find that Respondent's refusal to comply with the Union's request to be in violation of the Act. The document was clearly relevant and necessary for the Union to intelligently prepare for bargaining with Respondent over the effects of the sale, which Respondent is legally obligated to do.

Conclusions with Respect to the Alleged Unfair Labor Practices

I have heretofore found for the reasons set forth that Respondent violated Section 8(a)(1) and (5) of the Act by unduly delaying providing relevant and necessary information during negotiations. I have also found immediately above that Respondent similarly violated the Act by not complying with the Union's request for the sales agreement on or within a reasonable time after March 15, 1989. I do not find that that Respondent has committed any of the other alleged unfair labor practices.

Although my finding that Respondent unlawfully delayed providing information during negotiations necessarily constitutes a finding of an instance of not bargaining in good

faith, I also find that Respondent has not engaged in a course of bad-faith conduct with respect to its contract negotiations with the Union or unlawfully discriminated against its locked-out employees who are members of the Union. I find that at the time of the lockout the parties were at impasse and that the lockout was lawful at its inception and remained lawful to the close of the record in this proceeding. I do not find in this record proof of antiunion animus on the part of Respondent.

CONCLUSIONS OF LAW

1. Respondent Brewery Products, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 247, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Since 1967, the Union has been the exclusive collective-bargaining representative of an appropriate unit of Respondent's driver/salesmen and warehousemen within the meaning of Section 9(a) of the Act.

4. Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act by:

(a) Unduly delaying compliance with the Union's request for necessary and relevant information regarding wages during 1988 negotiations for a new collective-bargaining agreement.

(b) Refusing to comply with the Union's March 15, 1989 request for a copy of a sales agreement between Respondent and another company, which agreement is necessary and relevant to the Union's obligation to bargain over the effects of the sale.

5. The unfair labor practices found above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent has not committed any other unfair labor practices as alleged in the amended complaint.

REMEDY

Having found that Respondent has violated Section 8(a)(1) and (5) of the Act, I recommend that Respondent be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, Brewery Products, Inc., Ann Arbor, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to supply to the Union in a timely manner information relating to wages paid to warehouse employees, which information is necessary and relevant to the Union's performance of its function as the exclusive bargaining agent of the unit employees.

(b) Failing and refusing to supply to the Union a copy of its sales agreement whereby it proposes to sell certain of its assets to another company, which agreement is necessary and relevant to the Union's obligation to bargain over the effects of the proposed sale.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Promptly furnish on request by the Union necessary and relevant information requested by it, including information relating to wages of warehouse employees and copies of any proposed sales agreement whereby the Respondent proposes to sell all or a portion of its assets to another company.

(b) Post at its place of business copies of the attached notice marked ''Appendix.''[7] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Sign and return to the Regional Director sufficient copies of the notice for posting by the Union, if it willing, at its office and meeting halls, including all places where notices to members are customarily posted.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to supply to Local 247, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, AFL–CIO, in a timely manner, information relating to wages paid to warehouse employees, which information is necessary and relevant to the Union's performance of its

function as the exclusive bargaining agent of our employees in the appropriate unit.

WE WILL NOT refuse to supply to the Union a copy of our sales agreement whereby we propose to sell certain of our assets to another company.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL promptly furnish on request by the Union necessary and relevant information requested by it, including information relating to wages of warehouse employees and copies of any proposed sales agreement whereby we propose to sell all or a portion of our assets to another company.

BREWERY PRODUCTS, INC.